



**STATE BOARD OF EQUALIZATION
STAFF LEGISLATIVE BILL ANALYSIS**

DRAFT

Date Amended:	04/13/09	Bill No:	<u>SB 229</u>
Tax:	Bay-Delta Fee	Author:	Pavley
Related Bills:	SB 735 (Steinberg)		

This analysis will only address the bill's provisions that impact the Board.

BILL SUMMARY

This bill would impose a fee of an unspecified amount on the beneficiaries of a Bay-Delta Conservation Plan that would be established under this bill and on those entities that divert water from a Delta water body, as specified. The Board of Equalization (Board) would be required to collect the fee and deposit the fees collected into the Delta Governance Account, which this bill would establish in the State Treasury.

Summary of Amendments

Since the previous analysis, this bill was amended to 1) provide that the California Water Commission may delegate certain projects to other appropriate state and local entities, and 2) make clarifying and technical changes related to the Bay-Delta Conservation Plan. The amendments do not impact the Board.

ANALYSIS

CURRENT LAW

Among other things, Chapter 8 (commencing with Section 1525) of Part 2 of Division 2 of the Water Code requires various persons or entities who hold a permit or license to appropriate water, lease water, file specific proofs of claim, or notice of extractions to pay an annual water rights fee according to a fee schedule established by the State Water Resources Control Board (SWRCB).

The Board is required to collect all annual and other water rights fees referred to it by the SWRCB, pursuant to the Fee Collection Procedures Law (Part 30 (commencing with Section 55001) of Division 2 of the Revenue and Taxation Code). The SWRCB, however, is responsible for appeals or claims for refund related to these fees.

The SWRCB provides the Board with the name and address of each person or entity who is liable for a water rights fee or expense, the amount of the fee or expense, and the due date. For fiscal year 2008-09, the Board issued approximately 14,000 assessments (which are billed as a "Notice of Determination") during the week of November 10, 2008.

The SWRCB is authorized to periodically adjust the fees and revise the fee schedule each fiscal year as necessary to conform the revenues collected from these fees to the revenue levels set forth in the annual Budget Act. The current fee schedule can be found at: http://www.waterrights.ca.gov/Fees/docs/feeschedule_fy0809.pdf

The fees paid to the Board are deposited in the Water Rights Fund in the State Treasury.

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PROPOSED LAW

This bill would add Division 28 (commencing with Section 80500) to the Water Code to enact the Bay-Delta Interim Governance Act of 2009 (Act) to require the State Natural Resources Agency (SNRA) to develop and adopt the Bay-Delta Conservation Plan (Plan) for the Bay-Delta. The Plan must achieve two goals of ecosystem recovery and improvements to the reliability of public water supplies.

The development and implementation of the Plan would be funded through a fee paid by all entities that are beneficiaries of the Plan and those entities that divert water from a Delta water body. Plan “beneficiaries” would be those entities that obtain or are delegated authority, pursuant to the Plan or its implementing agreements, to take endangered, threatened, or candidate species protected under state or federal law. “Delta” means the Sacramento-San Joaquin Delta estuary, as defined in Water Code Section 12220, and Suisun Bay.

The California Water Commission (Commission) would be required to establish the fee, in consultation with the SNRA and SWRCB, sufficient to fund the development and implementation of the Plan. The fee may be graduated to reflect such factors as the volume of water diverted, the nature and type of the diversion, and other factors as determined by the Commission.

Pursuant to Section 80535, the Board would be required to collect the fee and deposit the moneys collected in the Delta Governance Account (Account), which this bill would establish in the State Treasury. Moneys in the Account would be expended, upon appropriation by the Legislature, only on projects or programs contained in the Plan.

BACKGROUND

Effective January 1, 2004, SB 1049 (Stats. 2003, Ch. 741) required the Board to collect the California Water Rights Fee on behalf of the SWRCB. SB 1049 was a budget trailer bill to, among other things, assess an annual water rights fee to be paid by entities that hold water rights that are under the jurisdiction of the SWRCB. The Legislative Analyst’s Office recommended the SWRCB program be funded through fees, rather than the General Fund.

IN GENERAL

The purpose of the Plan is to provide for the conservation of threatened and endangered fish species in the Delta and improve the reliability of the water supply system within a stable regulatory framework. The Plan is being developed to provide for the issuance of permits under the Federal Endangered Species Act and the California Natural Community Conservation Planning Act and is undergoing extensive environmental analysis, which includes public review and comment. A March 2009 overview and update of the Plan can be found on the SNRA website at www.resources.ca.gov/bdcp.

The Plan Steering Committee was formed in mid-2006, and members of the Steering Committee signed a Planning Agreement in late 2006. In late 2007, the Steering Committee published *Points of Agreement for Continuing into the Planning Process*, which outlined basic approaches for developing the elements of the Plan. The basic elements of the Plan include:

- Identifying conservation strategies to improve the overall ecological health of the Delta
- Identifying ecologically friendly ways to move fresh water through and/or around the Delta
- Addressing toxic pollutants, invasive species, and impairments to water quality
- Providing a framework and funding to implement the plan over time

As the Plan is being developed, various state and federal agencies are developing a joint Environmental Impact Report/Statement to determine the environmental impacts of the Plan.

COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author and is intended to provide a funding source to address the “environmental crisis of the Bay-Delta.” According to the author’s office, this bill would implement two coequal goals proposed by the Governor’s Delta Vision Blue Ribbon Task Force, which are to restore the Delta ecosystem and create a more reliable water supply for California.
2. **The April 13, 2009 amendments** would 1) provide that the California Water Commission may delegate certain projects to other appropriate state and local entities, and 2) make clarifying and technical changes related to the Bay-Delta Conservation Plan. The amendments do not impact the Board.
3. **It is not clear who would be responsible for paying the fee.** While the author’s office has indicated that it is working with various stakeholders to clarify who would pay the fee and upon what basis, there are many questions which will need to be answered. It is not clear who would be a “Plan beneficiary.” Is a Plan beneficiary any person or entity who uses water from the Delta? What types of water usage would be subject to the fee (e.g., domestic use, farming, or industry)? Who are the entities that divert water from the Delta? Section 80535 provides that “Plan beneficiaries” include entities that *obtain* or are *delegated authority*, pursuant to the Plan or its implementing agreements, *to take endangered, threatened, or candidate species* protected under state or federal law. What does “take endangered, threatened, or candidate species” mean? It is not clear whether these persons or entities are consumers of something other than water (e.g., endangered species). If they are, would “beneficiaries” be persons who fish and hunt in the Delta, or commercial entities that rely on taking Delta flora or fauna for their livelihoods, or both, or someone else?

As currently drafted, the Board would not be able to collect the fee.

4. **It is suggested that the proposed fee be collected similarly to the existing water rights fee.** The Board currently collects the water rights fee on behalf of the SWRCB. Each year, the SWRCB revises the fee schedule and adopts changes to the schedule through emergency regulations. The SWRCB provides the Board with a list of names and addresses of each person or entity who is liable for the fee and the amount and due date of the fee. These administrative procedures are contained in both the Revenue and Taxation and Water Code statutes and enable the Board to effectively collect the water rights fee.

5. **The bill needs administrative and collection provisions.** The bill has several administrative and technical issues that would need to be addressed before the bill becomes law. Staff will work with the author's office to address the issues as the bill progresses through the Legislature. The following details some of the administrative issues:

Reference to Fee Collections Procedures Law. The bill should specify that the Board is authorized to collect the fee pursuant to the Fee Collection Procedures Law. The Fee Collections Procedures Law contains "generic" administrative provisions for the administration and collection of fee programs to be administered by the Board. The Fee Collections Procedures Law was added to the Revenue and Taxation Code to allow bills establishing a new fee to reference this law, thereby only requiring a minimal number of sections within the bill to provide the necessary administrative provisions. Among other things, the Fee Collection Procedures Law includes collection and reporting provisions, as well as providing the Board the authority to adopt regulations relating to the administration and enforcement of the fees it collects pursuant to the Fee Collections Procedures Law.

Petitions for redetermination and claims for refund. It is suggested that, for purposes of the proposed water fee, the Commission handle the petitions for redetermination and approve the claims for refund based upon the grounds that the Commission is responsible for establishing the proposed fee and would have been responsible for improperly or erroneously calculating the amount of the fee and/or incorrectly identifying a feepayer. It would be difficult for Board staff to resolve feepayer protests and claims based on actions of another agency, and doing so could result in a significant number of additional appeals conferences and Board hearings.

Names and addresses of feepayers should be provided to the Board. Board staff would not know what persons or entities should be subject to the proposed fee. It is suggested that the Commission provide the Board with the names and addresses of each person or entity that it has determined is liable for the proposed fee, the amount of the fee, and the due date of the fee and that the Commission allow the Board sufficient time to assess the fees prior to the due date.

The Board would need sufficient time to implement the new fee program. To effectively implement this bill, it would be necessary for the Board to notify and register new feepayers, develop computer programs, hire and train key staff, create necessary forms and schedules, and answer taxpayer inquiries. These functions should take place before the fee becomes operative. Board staff estimates that it would take approximately six months to implement the new fee program.

Disposition of fees – refund payments and administrative costs. The bill provides that, upon appropriation by the Legislature, the moneys in the Delta Governance Account shall be expended exclusively on projects or programs contained in the Plan. The bill does not contain provisions for payment of refunds or reimbursement of the Board's administrative costs.

6. **This bill lacks a direct appropriation for the Board's administrative start-up costs.** The new fee would be imposed on an unspecified date while the bill would take effect on or after January 1, 2010. In order to implement the proposed fee program, the Board would need to develop the feepayer base, reporting forms and notices, and computer programs, and hire appropriate staff in 2010, which is in the middle of the state's 2009-10 fiscal year. The Board would need an adequate

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appropriation to cover administrative start-up costs that would not be identified in the Board's current year budget.

7. **Legal challenges of any new fee program might be made on the grounds that the fee is a tax.** In July 1997, the California Supreme Court held in *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866 that the Childhood Lead Poisoning Prevention Act of 1991 imposed bona fide regulatory fees and not taxes requiring a two-thirds vote of the Legislature under Proposition 13. In summary, the Court found that, while the Act did not directly regulate by conferring a specific benefit on, or granting a privilege to, those who pay the fee, it nevertheless imposed regulatory fees under the police power by requiring manufacturers and others whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating those products' adverse health effects.

Although this measure has been keyed by the Legislative Counsel as a majority vote bill, opponents of this measure might question whether the fees imposed are in legal effect "taxes" required to be enacted by a two-thirds vote of the Legislature.

8. **Related legislation.** SB 735 (Steinberg) would enact the Safe, Clean, and Reliable Drinking Water Supply Act of 2010 and require the Board to collect fees on residential, commercial, industrial, and agricultural water users in this state.

COST ESTIMATE

The Board would incur non-absorbable costs to adequately develop and administer a new fee program. These costs would include registering fee payers, developing computer programs, mailing and processing assessments and payments, developing letters and publications, training staff, and answering inquiries from the public. As currently drafted, the bill does not identify the entities that would be subject to the proposed fee. A cost estimate of Board staff's workload will be prepared as the bill is amended to clarify the number and scope of fee payers.

REVENUE ESTIMATE

This measure does not specify the amount of the proposed fee. Accordingly, a revenue estimate could not be prepared.

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